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In the

Supreme Court of the United States

No. 81-2312

OCTOBER TERM, 1981

Missouri Pacific Railroad Company ..... *Petitioner*

V.

United States Steel Corporation ..... *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
II.	REASONS FOR REFUSING THE WRIT	8
	(a) The Eighth Circuit Properly Found That MOPAC Actively Interfered.	8
	(b) There Are No Special and Important Reasons as Required by Rule 17 for Granting Certiorari.	10
III.	CONCLUSION	12

TABLE OF AUTHORITIES

Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959) (Frankfurter, J. dissent.) 11

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STATEMENT OF THE CASE

This appeal questions an award of damages resulting from only one (150 days) of four periods of delay which impeded American Bridge Division (ABD) of U.S. Steel from completing in a timely fashion its contractual obligations in replacing the superstructure of two railroad bridges across the Arkansas River at Little Rock. The work was performed in 1969-1970.

Before ABD could begin its work on the Junction Bridge, the first of the bridges to be remodeled, it was necessary for the Al Johnson Company to complete substructure work there and construct a shoofly (temporary bridge) for the rerouting of traffic. See *Al Johnson Construction Co. v.*

Missouri Pacific Railroad Co., 426 F. Supp. 639 (E.D. Ark. 1976), aff'd mem., 553 F.2d 103 (8th Cir. 1977). Johnson's contract called for completion of its work in 375 days. Johnson was given its notice to proceed on August 6, 1968 and ABD submitted its initial construction schedule showing the beginning of span removal on September 1, 1969.

Subsequent to the completion of the design for the shoofly, Missouri Pacific (MOPAC) learned that the minimum pool elevation of the river would be 231 feet following the closure of the Terry Dam in September 1968. The design of the shoofly was such that when the pool was 231 feet, the piles protruded above the water level only about a foot. Concrete pier caps had to be formed on top of the piles. It was apparent that after the Terry Dam closure, it would take little more than a drizzle upstream to raise the water level at the shoofly and make it impossible to construct the pier caps. Instead of redesigning the shoofly so that the piles would extend further up out of the water, MOPAC directed that Johnson proceed. Edward H. Young, Jr., one of the consulting engineers, admitted that the high water condition was known and that the shoofly could have been redesigned, but he disclaimed individual responsibility. (T. 151) On September 23, 1968 the elevation of the river was 230.1 feet, and it never went any lower. The river was much higher on numerous occasions, causing constant interruption of progress on the shoofly construction. The defective design made the contractual timetable a pipe dream. A chronology of important events follows:

August 17, 1968. Johnson discovered a hard rock ledge jutting out near the location of the new south pier of the Junction Bridge. This ledge was not shown on the contract documents. (426 F. Supp. 639, 643)

August 21, 1968. Discovery of the rock ledge was disclosed to MOPAC, and it was agreed that a large portion of the ledge would have to be removed in order to install the

pier. The specs required the pier to be constructed in the "dry". Johnson recommended the use of a cellular cofferdam (426 F. Supp. 639, 643). The construction of this cofferdam was more time consuming than the construction of a caisson. (T. 80) A box cofferdam could probably been completed in 3 months. (T. 150) The cellular cofferdam was not completed until July 29, 1969 which was almost a year after the rock ledge was discovered. (T. 146)

October 24, 1968. ABD was given notice that it had been awarded the superstructure contract. The contract was later back-dated to July 17, 1968. (Exhibit 7)

October 28, 1968. Al Johnson encountered hard quartz at shoofly bent 9. (Young's diary, p. 28) Drilling through quartz takes more time. (T. 152 and 173)

October 30, 1968. Al Johnson encountered steel in the riverbed at pile #6. (Young's diary, p. 29)

November 4, 1968. It was decided to dewater the pile at bent 11 to see if there was metal or something else at the bottom. Quartz was encountered at bent 6. Young's diary noted that Johnson had just about worn out the rollers on the rock bit. (Young's diary, p. 32)

November 22, 1968. ABD was given notice to proceed with its contract work. This meant that ABD's clock was started. Shop drawings had to be prepared, mill orders had to be placed, steel had to be fabricated and then shipped to the construction crew in the field. Once this work is started, it cannot be stopped. (T. 42-43) If ABD did not complete the job in the specified time, liquidated damages of $600 a day were payable.

November 29, 1968. The river rose to 235.5 feet and over the top of the shoofly piles. The cofferdam cell under the Junction Bridge turned over. (Young's diary, p. 51)

December 12, 1968. ABD submitted its construction schedule as required by the contract showing that it would be prepared to start removing the old spans from the Junction Bridge on September 1, 1969. (Exhibit 10)

December 18, 1968. Al Johnson notified MOPAC by letter that it was encountering hard rock between bents 6 and 12 of the shoofly. The existence of this hard rock resulted in increased drilling time by Johnson for 79 of 124 piles, caused extensive wear on Johnson's drilling bits, and created unexpected difficulties in properly seating the pipe pile into the subsurface rock. (Exhibit 54, Admissions 50 and 51) The hard rock formations were conditions substantially different from those which had been indicated by the borings MOPAC had furnished to Johnson. (426 F. Supp. 639, 634) The rock made Al Johnson's work more time consuming and delayed the progress of the work. (Exhibit 53, Admission 10)

March 5, 1969. Early Owen, project superintendent for ABD, made his first site visit and learned that the shoofly construction was three and one-half months behind schedule. (Exhibit 45, Owen's diary) Johnson completed filling the first cofferdam cell with stone at the south pier of the Junction Bridge. (Young's diary, p. 113) MOPAC wrote ABD advising that Al Johnson's new schedule showed completion of the substructure for the Junction Bridge on December 14, 1969. (Exhibit 11) The letter stated that Al Johnson had been advised that his revised construction schedule conflicted with ABD's fabrication and erection schedule under the terms of ABD's contract.

April 11, 1969. ABD wrote MOPAC acknowledging the notice of Johnson's delay and asked for an extension pursuant to provision 41 of the contract. The letter states, "We also wish to point out the fact that any delay in our starting construction as scheduled on September 1, 1969 will not only result in an equal delay and completion of our work, but also will cause the work to be accomplished at a higher labor cost. After the extent of the delay to our schedule is known, we will advise you of our anticipated additional costs." (Exhibit 12)

July 2, 1969. MOPAC wrote ABD enclosing a new construction schedule received from Johnson. (Exhibit 17) The schedule showed completion of the shoofly on December 31, 1969. (Exhibit 18)

July 21, 1969. MOPAC supplied ABD with another Johnson schedule which showed completion of the shoofly on January 11, 1970 and completion of the new south pier at the Junction Bridge on March 8, 1970. (Exhibit 54, Admission 91, See Exhibit 21)

July 31, 1969. Al Johnson notified MOPAC that excavation at shoofly bent 21 would have to be 3.06 feet below the excavation shown in the bid documents. Sandbags could not control the water at the lower grade, and it was necessary to construct a steel cofferdam. (426 F. Supp. 639, 645) The excavation made Johnson's work more time consuming. (Exhibit 54, Admissions 70, 71, 72, 75, 76, and 77) ABD was not advised of the problem. (T. 50)

August 18, 1969 Johnson informed MOPAC that it had encountered foreign steel while driving pipe pilings at the shoofly. (Exhibit 53, Admission 11) This made Johnson's work more time consuming. (Exhibit 53, Admission 13)

December 9, 1969. The first steel for the superstructure was shipped by ABD's fabrication plant. (Exhibit 2, T. 52)

December 19, 1969. ABD wrote MOPAC pointing out that the shoofly would not be completed until sometime between January 26 and February 1, 1970. On the same day the railroad advised ABD for the first time that it had added four pier protection cells to Al Johnson's work at the shoofly. (Exhibit 42, Exhibit 54, Admission 97) The construction of the four cells would take additional time. (T. 153) MOPAC's Exhibit 3 shows that these cells were proposed on March 17, 1969 (9 months before ABD knew about them) and had been approved by the Corps of Engineers on June 16, 1969 (6 months before ABD knew of them). The addition of these cells

made it absolutely impossible for Johnson to complete his work on time, yet on July 2, 1969, MOPAC gave ABD a schedule showing completion of the shoofly on December 31, 1969. Then, on July 21, 1969 MOPAC forwarded notice of 11 days' additional slippage; and on August 15, 1969 gave notice of 2 weeks more slippage, but it kept its silence about the known addition of the four pier protection cells. Johnson did not commence work on the new cells until January, 1970 and they were not completed until February 14, 1970. (Young's diary, p. 409)

December 29, 1969. ABD's first barge load of steel was found tied to the shoofly, having been delivered over the holidays. (Young's diary, p. 368)

December 31, 1969. ABD wrote MOPAC expressing apprehension over the addition of the shoofly pier protection cells, advised that it was moving its forces on to the job site starting January 5, 1970, and warned that any delay in the commencement of the work would be expensive. (Exhibit 26)

January 5, 1970. ABD moved on the construction site to commence work. (Exhibit 54, Admission 101)

January 8, 1970. MOPAC informed ABD that the shoofly would not be operable until about the second week of February, 1970. (Exhibit 37)

February 14, 1970. Johnson completed the shoofly protection cells. (Young's diary, p. 409)

February 23, 1970. MOPAC completed removal of the rail from the Junction Bridge so that ABD could commence its work. (Exhibit 54, Admission 105)

October 23, 1970. MOPAC wrote ABD and granted a 175 day extension on the superstructure contract. (Exhibit 36) This letter states:

> "American Bridge's original construction schedule indicated site work to begin on September 1, 1969. Our records indicate that you were unable to proceed because of reasons stated in your letter until February 23, 1970. According to the calculations of our engineer, this resulted in an unavoidable delay on your part of 175 days . . . ."

The railroad acknowledged that 25 of the 175 days delay was attributable to MOPAC's own slowness in laying track on the shoofly and rerouting its traffic from the Junction Bridge to the shoofly.

REASONS FOR REFUSING THE WRIT

I.

THE EIGHTH CIRCUIT PROPERLY FOUND THAT MOPAC ACTIVELY INTERFERED.

The Eighth Circuit concluded that the term "active interference" implies the existence of some affirmative, willful act in bad faith which unreasonably interfers with the contractor's compliance with the terms of the construction contract. The Court recognized that the affirmative willful act of MOPAC was the issuance of the notice to proceed, and the requisite bad faith of the railroad was demonstrated by its knowledge that delay-causing circumstances existed which would likely cause ABD from timely proceeding with its work. (A-8)

The District Judge had found:

> "Until the notice to proceed was issued, ABD had free choice and complete flexibility to reschedule its orders and its work force. But it lost this freedom and flexibility when MOPAC issued the notice to proceed on November 22, 1968, at a time when Johnson had already encountered the unexpected rock ledge, redesigned its cofferdam, and found steel in the riverbed, all of which should have indicated to MOPAC that adjustment in schedules would be necessary because of the inevitable delay these changes would bring in the completion of the substructure work. The notice to proceed had a coercive and restricting effect upon ABD by virtue of the provisions of the contract." (A-20-21) * * *
>
> "ABD should not bear the cost of 150 day delay because it was MOPAC's active interference which prevented ABD from protecting its own interests as it could have done had it retained flexibility to schedule and had the other contractor proceeded with accurate specifications." (A-25)

The record is replete with circumstances which justify the decision of the District Judge which was affirmed by Circuit Judge Stevenson and Senior District Judge Henson. Rehearing was denied, Judge Arnold not participating.

That Al Johnson Company would not complete the shoofly on time was predestined when MOPAC issued its original design for the piles although it was aware that the river surface would never be less than one foot below the top of the piles while the work progressed. Only a drought of epic proportions would have saved the contractual timetable.

The discovery on August 17, 1968 of the rock ledge could only have meant delay, yet MOPAC later issued to ABD a notice to proceed rather than suspend the work under Article 35 of Section 1 of the contract. As a matter of fact, Johnson started work on the cellular cofferdam necessitated by the rock ledge on November 20, 1968, just two days before the notice to proceed was given to ABD. The cofferdam was not completed until July 29, 1969, nearly eight months later. In suggesting that the District Judge and the Eighth Circuit did not consider MOPAC's bad faith in their finding of active interference, MOPAC is not being realistic.

On October 28, 1968 Al Johnson Company encountered unexpected hard quartz and on October 30, 1968 Johnson struck steel in the riverbed—none of which had been warned of in the contractual documents. Twenty-five days later the notice to proceed was given to ABD.

After the notice to proceed was given, MOPAC's conduct was no less reprehensible. On March 17, 1969, four additional pier protection cells were proposed to be added to Johnson's shoofly construction contract. This proposal was approved on June 16, 1969 (six months before ABD was told). Yet, on July 2, 1969 MOPAC gave ABD a schedule showing that Johnson would complete the shoofly on December 31, 1969. Two more notices of slippage were later given, but the delay that was to be caused by the addition of the newly conceived pier

protection cells was never mentioned. On December 19, 1969 MOPAC finally got around to telling ABD that the cells had been added to Johnson's contract. Work did not begin on the new cells until January, 1970 and they were not completed until February 14, 1970. This was only nine days before MOPAC completed removal of the rail from the Junction Bridge so that ABD could commence its work. The delay caused by the addition of the cells was not the mere failure of the substructure contractor to complete its work on a specified date. This delay was caused by MOPAC's amendment of the substructure contract, long after giving ABD a notice to proceed.

II.

THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING CERTIORARI AS REQUIRED BY RULE 17.

The decision below does not cast the slightest doubt on the validity of "no damages" clauses. Both the District Judge and the Eighth Circuit went out of their way to make it clear that such clauses, when clear and unambiguous, will be enforced according to their terms.

MOPAC lost the battle but won the war! The Court of Appeals said that active interference which is sufficient to overcome the effect of a no damage clause requires a finding that the contractor committed some affirmative, willful act in bad faith which unreasonably interfered with the contractor's compliance with the terms of the construction contract. The Court then affirmed the District Judge who had found such conduct on the part of the railroad.

MOPAC merely wants a remand which would require the District Judge to add the words "bad faith" to his finding that MOPAC was chargeable with active interference. The District Judge said that more was required than mere mistake or negligence.

The advise of Frankfurter, J., dissenting in *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 461; 79 S.Ct. 921; 3 L.Ed.2d 935 (1958) is applicable:

> "It is the staple business of Courts of Appeals to examine records for the sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice. Such disregard of sound judicial administration is emphasized by the fact that the judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury. If due regard be paid to the weighing of conflicting evidence and inferences drawn therefrom by these experienced judges, can it be fairly said that there was no reasoned justification for their conclusion and that their judgment was baseless? If not, we should leave undisturbed the judgment below. After all, we are reviewing the judgment of the Court of Appeals, and it is its judgment that must be subjected to the rule of reason."

CONCLUSION

The petition for a writ of certiorari should be denied. The finding of active interference on the part of the railroad is fully justified by the record. There is no special and important reason for granting a review on writ of certiorari.

Respectfully submitted,

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